



Implications of the Proposed Federal Clean Water Protection Rule for Federal Jurisdiction over Waters within North Carolina

Ag & Forestry Study Commission Meeting

January 22, 2014

Navigable Waters

- Rivers and Harbors Act of 1899 - Navigable waters are those waters that are subject to the ebb and flow of the tide, and those inland waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce while the waterway is in its ordinary condition.
- Federal Water Pollution Control Act of 1972, a.k.a Clean Water Act (CWA) introduced the terms "Traditional Navigable Waters," (TNW) and "Waters of the United States" to define the scope of Federal jurisdiction under the Clean Water Act. Here, "Waters of the United States" include not only navigable waters, but also tributaries of navigable waters and nearby wetlands

Waters of the U.S. include:

- Streams, Rivers, Tributaries to TNW's
 - Intermittent and Perennial, but not Ephemeral
- 404 Jurisdictional Wetlands
 - Must be adjacent or have significant nexus to TNW's
- Other open water bodies connected to navigable waters, such as ponds, lakes, estuaries, oceans
- Corps uses technical delineation methods for streams (form) and wetlands (1987 manual)

U.S. Supreme Court Interpretations

- SWANCC case – 2001 – Feds lost 404 jurisdiction over isolated wetlands (those not adjacent to navigable waters)
- Rapanos case – 2006 - need to demonstrate a wetland's Significant Nexus to Navigable Waters to qualify as Waters of the U.S.
- Within NC, wetlands either isolated or lacking a significant nexus include about 1-3% of all, Rapanos being especially minor in NC

Responses to SWANCC/Rapanos

- EPA/Corps issued policy documents in 2003 and 2008 to clarify remaining jurisdictional wetlands throughout the U.S.
- Another draft guidance document placed on notice for public comment in 2011.
- Consensus opinion in 2011: prefer rulemaking to ongoing guidance documents.

Draft Clean Water Protection Rule

- Draft Proposed Clean Water Protection Rule (CWP Rule) leaked around September 2013
- Draft Rule currently under review by multiple Federal agencies
- Leaked version will differ from published
- Draft to be published in Federal Register for 90-day public comment around spring 2014
- Anticipate 300,000+ comments, expect over two year process before final version

What *may* be IN jurisdiction, meaning Waters of the United States

Before CWP Rule

- Streams and tributaries with greater than ephemeral flow to navigable waters
- Instream ponds or ditches
- Traditional navigable waters (TNWs)
- Ditched natural streams
- Wetlands adjacent to TNW's
- Wetlands with significant nexus

After CWP Rule

- Streams and tributaries with greater than ephemeral flow to navigable waters
- Instream ponds or ditches
- Traditional navigable waters
- Ditched natural streams
- Wetlands adjacent to TNW's
- Wetlands with significant nexus (nexus may be groundwater)
- Underground tributaries (tributaries through wetlands)

What *may* be OUT of jurisdiction, not Waters of the United States

Before CWP Rule

- Waters lacking significant nexus
- Ephemeral streams
- Erosional features that are not tributaries or wetlands
- Ditches excavated in uplands, drain only uplands, not flowing to Waters of the US
- Wastewater treatment ponds
- Artificial pools and ponds dug or diked in uplands
- Irrigated areas that would revert if not irrigated
- Agricultural Exemptions
- Prior Converted Cropland

After CWP Rule

- Waters lacking significant nexus
- Ephemeral streams
- Erosional features that are not tributaries or wetlands
- Ditches excavated in uplands, drain only uplands, not flowing to Waters of the US
- Wastewater treatment ponds
- Artificial pools and ponds dug or diked in uplands
- Irrigated areas that would revert if not irrigated
- Agricultural Exemptions
- Prior Converted Cropland

Conclusions

- 2001 & 2006 Supreme Court cases slightly affected NC
- 1% to 3% of all wetlands in NC were deemed to be not Waters of the US
- Proposed federal rulemaking would not significantly alter the status quo in North Carolina
- Minimal effect in North Carolina
 - Potential larger effect in other parts of the US

Contact Information

Tom Reeder

Director, NC Division of Water Resources

919-707-9027

tom.reeder@ncdenr.gov

